

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO AGATON-HERNANDEZ,

No. C 14-2461 CRB

Petitioner,

**MEMORANDUM AND ORDER
DENYING PETITION FOR HABEAS
CORPUS**

v.

AMY MILLER, Warden,

Respondent.

Following a bench trial in California state court, Petitioner Francisco Agaton-Hernandez was convicted of second degree murder on July 21, 2011. Ex. A (dkt. 19-2) at 185. On August 26, 2011, the trial court sentenced Petitioner to fifteen years to life in state prison. Ex. A (dkt. 19-2) at 275-76. Petitioner now petitions for a writ of habeas corpus, arguing that he was deprived of his constitutional right to due process because he received ineffective assistance of counsel. Pet. (dkt. 1) at 3. The state court decisions rejecting Petitioner's claims were neither contrary to clearly established federal law nor based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). For the reasons set forth below, the Court hereby DENIES Petitioner's request for federal habeas relief.

I. BACKGROUND

The California Court of Appeal summarized the facts of the case as follows:

Victor Cabrera was [Petitioner's] former boss and the coconspirator in the murder. On September 28, 2008, Cabrera strangled to death his girlfriend, Roshni Singh, sometime between midnight and 2:00 a.m. at their home in Marina. [Petitioner] was working at a donut shop in

1 Seaside at the time, but he joined Cabrera later that morning.
2 [Petitioner] admitted he helped Cabrera cover up the murder by staging
3 a robbery, moving the body, and disposing of evidence. [Petitioner]
4 denied he was involved in planning to kill Singh. He claimed he was
5 unaware of the murder until after Cabrera had killed Singh. However, a
6 witness, Jose Ayuzo, told police that [Petitioner] offered to pay him
\$30,000 to tie up a woman and batter her. Several hours before Singh
was killed, [Petitioner] told Ayuzo to go to a gas station in Monterey to
commit the assault, but Ayuzo did not go. Cabrera killed Singh later
that night.

7 **I. Cabrera's Fabricated Coverup Story to Police**

8 Victor Cabrera worked at the Village Motor Works Gas Station on
9 North Fremont Street in Monterey. On September 28, 2008, the day of
10 the murder, at around 6:30 a.m., Cabrera called 911 from the gas station.
11 When police arrived, they found Cabrera on the floor, with his hands
12 tied behind his back. Candy boxes and other items were scattered on the
13 floor. Cabrera claimed he had been robbed. He said he had struggled to
14 free himself for approximately 45 minutes, until he was able to knock
15 over a phone with his nose and dial 911 with his tongue.

16 Cabrera told police the following false story: He and Singh had driven to
17 the gas station at about 5:00 a.m. in a red Toyota 4Runner. They were
18 planning to go shopping in Berkeley, but he had left his wallet, jacket,
19 and cell phone charger at the gas station the night before. They went to
the gas station to retrieve the items before going to Berkeley. Singh
remained in the car while he went into the shop. After he went into the
shop, two dark-skinned males entered the shop and robbed him. One
had a knife, and the other had a handgun. They took his wallet and cell
phone, tied him up, and struck him several times. He did not know what
happened to Singh or the 4Runner during the robbery. He noticed that
the 4Runner was missing when he was calling 911.

20 Cabrera gave police permission to search his home in Marina, where
21 they found Singh's wallet and cell phone. Later that day, police found
22 the 4Runner parked at an apartment complex in Monterey. Singh's
23 body was lying face down in the back seat.

24 Cabrera was the beneficiary of a \$600,000 life insurance policy on
25 Singh. A second policy for \$360,000 named Singh's son as a
26 beneficiary. Cabrera had planned to take care of Singh's son in the
27 event of her death.

28 Cabrera disappeared before police could arrest him. At the time of
[Petitioner's] trial, Cabrera was still missing.

29 **II. [Petitioner's] Involvement in the Murder**

30 Police found [Petitioner] through a search of Cabrera's phone records.
31 The records showed calls to and from a phone belonging to "Martin
32 Cerda," an alias used by [Petitioner]. Cabrera had previously been a
33 manager at a Burger King. He had helped [Petitioner] obtain a job at the
34 Burger King by supplying him with a social security number and the
35 Martin Cerda alias.

36 [Petitioner] made numerous inconsistent statements in multiple
37 interviews with the police. After lying about many aspects of his

1 involvement in the crime, [Petitioner] eventually admitted to the
2 following: Cabrera had visited him at work at Red's Donuts in Seaside
3 on September 27, 2008, the night before the murder, around 10:00 p.m.
4 to 11:00 p.m. Cabrera wanted [Petitioner] to come to Cabrera's home in
5 Marina, but [Petitioner] said he did not get off work until 4:00 a.m. or
6 5:00 a.m. They then spoke on the phone shortly after 4:00 a.m., when
7 Cabrera again invited [Petitioner] to his home in Marina. [Petitioner]
8 initially claimed he did not know why Cabrera wanted him to go to
9 Marina. [Petitioner] later said Cabrera wanted him to clean the house.

6 At around 4:30 a.m., [Petitioner] left Red's Donuts, went home, and
7 changed his clothes. He was due at his second job at Burger King at
8 6:30 a.m. Nevertheless, he took a taxi from his home to Cabrera's home
9 in Marina at around 5:00 a.m. Police interviewed the taxi driver, who
10 confirmed that he drove [Petitioner] to Marina around that time. The
11 driver noticed that [Petitioner] was wearing plastic gloves. [Petitioner]
12 told the driver to drop him off on a corner several houses away from
13 Cabrera's house. [Petitioner] also told the driver he would need another
14 ride later.

11 When [Petitioner] got to Cabrera's house, Singh was already dead.
12 [Petitioner] claimed Cabrera did not tell him about the murder until
13 [Petitioner] arrived, and that Cabrera had everything planned.
14 [Petitioner] insisted he would not have gone to Cabrera's house if he had
15 known Cabrera had killed Singh.

14 [Petitioner] said Cabrera invited him in and asked him to help move the
15 body into the car. Singh's body was on a sofa in the living room.
16 [Petitioner] helped Cabrera move the body to the car. [Petitioner]
17 opened the car door, and Cabrera pushed the body into the car.
18 [Petitioner] also turned over the couch cushions that were underneath
19 the body.

18 Cabrera and [Petitioner] then took the body to the gas station to stage
19 the robbery. At the gas station, Cabrera gave [Petitioner] a rope.
20 Cabrera told [Petitioner] to tie him up, hit him, and throw around some
21 candy and cigarettes. [Petitioner] tied Cabrera, hit him twice, and threw
22 some candy bars on the floor. [Petitioner] then took Cabrera's cell
23 phone and wallet, and threw them in the rear parking lot.

21 After staging the robbery, [Petitioner] drove the 4Runner with Singh's
22 body in the back to an apartment complex in Monterey, where he parked
23 the car with the body. He threw the car keys into the bushes, and called
24 the taxi driver to pick him up. Police later located the keys where
25 [Petitioner] said they were.

24 [Petitioner] said he helped Cabrera because Cabrera had treated him
25 well and had helped him get a social security number and a job.
26 [Petitioner] said Cabrera was planning to buy the gas station, and had
27 promised [Petitioner] a job there. [Petitioner] denied that he asked
28 Cabrera for money, but he said Cabrera had promised to give him
money after the crime was completed. Cabrera did not say how much
money he would give [Petitioner].

28 **III. Jose Ayuzo's Involvement**

Police also found Jose Ayuzo after discovering numerous phone calls

1 between [Petitioner] and Ayuzo in the days before the murder. When
2 police interviewed Ayuzo, he initially denied any involvement, but he
3 later admitted [Petitioner] had solicited his help. Ayuzo made multiple
4 different statements, mixed up the timing of events, and gave vague
5 answers to specific questions. At trial, the parties stipulated that Ayuzo,
6 if called to testify, would give testimony consistent with the following:

7 One week before the murder, [Petitioner] offered Ayuzo \$30,000 to help
8 him tie up and batter a woman at a tire shop in Monterey. The money
9 belonged to the woman's boyfriend, who was [Petitioner's] friend.
10 After this conversation, however, Ayuzo was arrested for shoplifting
11 and decided not to help [Petitioner] with the crime. But because Ayuzo
12 feared [Petitioner], he kept telling [Petitioner] he would help with the assault.

13 Ayuzo met with [Petitioner] again several days before the murder.
14 [Petitioner] told Ayuzo to meet him at a tire shop and gas station on
15 North Fremont Street in Monterey at 5:00 p.m. on September 27, 2008.
16 The plan was for the woman to arrive there with her boyfriend,
17 whereupon [Petitioner] and Ayuzo would beat her and tie her up.

18 On the afternoon of September 27, [Petitioner] saw Ayuzo on the street,
19 and offered him a ride. [Petitioner] told Ayuzo to be at the gas station at
20 5:00 p.m. Ayuzo later said the time was between 5:00 p.m. and 7:00
21 p.m. Ayuzo turned off his cell phone during part of the evening, and did
22 not go to the tire shop. Later that evening, he turned his phone on and
23 called [Petitioner], who was angry with Ayuzo. Ayuzo said multiple
24 times that he did not hurt Singh or move her body.

25 Phone records show [Petitioner] and Ayuzo called each other more than
26 two dozen times between September 17 and September 26, 2008. On
27 September 27, [Petitioner] called Ayuzo more than thirty times. On
28 September 28, [Petitioner] called Ayuzo nine times. After 6:45 p.m. on
September 27, all [Petitioner's] calls went to Ayuzo's voice mail.
Ayuzo's phone service was canceled on September 28.

People v. Agaton-Hernandez, No. H037855, 2013 WL 3240054, at *1–3 (Cal. Ct. App. June
27, 2013) (footnotes omitted).

On August 11, 2009, the Monterey County District Attorney charged Petitioner with
murder (Cal Penal Code § 187(a)), with a special circumstance allegation that the murder was
for financial gain (Cal. Penal Code § 190.2 (a)(1)). Ex. A (dkt. 19-1) at 93-95. In addition,
the District Attorney charged Petitioner with conspiracy to commit murder (Cal. Penal Code
§ 182(a)(1)). Id. Petitioner waived his right to a jury trial in exchange for the dismissal of
the special circumstance allegation and the capping of any conviction at second degree
murder. Ex. A (dkt. 19-2) at 172. After a three day bench trial, on July 21, 2011, the trial
court found Petitioner guilty of second degree murder. Id. at 185. On August 26, 2011, the
trial court sentenced Petitioner to fifteen years to life in state prison. Id. at 275. The

1 California Court of Appeal affirmed Petitioner's judgment in an unpublished decision on
2 June 27, 2013. Ex. E (dkt. 20-7).

3 In conjunction with his appeal, Petitioner filed a petition for a writ of habeas corpus
4 with that court. Ex. G (dkt. 21-2). The Court of Appeal rejected the habeas petition without
5 comment on June 27, 2013, Ex. I (dkt 21-5) at 51, and the California Supreme Court denied
6 review on October 2, 2013. Ex. F (dkt. 21-1).

7 Having exhausted his potential remedies in state court, Petitioner filed this federal
8 habeas petition on May 28, 2014, alleging ineffective assistance of counsel. Pet. at 5-10.

9 **II. STANDARD OF REVIEW**

10 Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this
11 Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody
12 pursuant to the judgment of a State court only on the ground that he is in custody in violation
13 of the Constitution or laws or treaties of the United States." 28 U.S.C § 2254(a). The writ
14 may not be granted with respect to any claim that was adjudicated on the merits in state court
15 unless the state court's adjudication of the claim, "(1) resulted in a decision that was contrary
16 to, or involved an unreasonable application of, clearly established Federal law, as determined
17 by the Supreme Court of the United States; or (2) resulted in a decision that was based on an
18 unreasonable determination of the facts in light of the evidence presented in the State court
19 proceeding." *Id.* § 2254(d).

20 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state
21 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
22 law or if the state court decides a case differently than [the] Court has on a set of materially
23 indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the
24 'reasonable application clause,' a federal habeas court may grant the writ if the state court
25 identifies the correct governing legal principle from [the] Court's decisions but unreasonably
26 applies that principle to the facts of the prisoner's case." *Id.*

27 "[A] federal habeas court may not issue the writ simply because the court concludes in
28 its independent judgment that the relevant state-court decision applied clearly established law

erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. A federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” Id. at 409. The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Id. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be “persuasive authority” for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent, only the Supreme Court’s holdings are binding on the state courts and only those holdings must be “reasonably” applied. Clark, 331 F.3d at 1069. “It is settled that a federal habeas court may overturn a state court’s application of federal law only if it is so erroneous that ‘there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.’” Nevada v. Jackson, 133 S. Ct. 1990, 1992 (2013) (citing Harrington v. Richter, 562 U.S. 86, 101 (2011)).

Finally, a federal court must consider whether any constitutional error at trial “had substantial and injurious effect or influence in determining the jury’s verdict,” because petitioners “are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citations omitted).

III. DISCUSSION

Petitioner argues that he received constitutionally defective representation from trial counsel. Pet. at 5-10. Petitioner identifies four errors allegedly resulting in ineffective assistance of counsel: (1) failure to adequately challenge prosecution witness Jose Ayuzo’s testimony; (2) failure to investigate a witness who contradicted Ayuzo’s statements; (3) failure to object to the introduction of Victor Cabrera’s statements; and (4) cumulative prejudice. Memo. of Law in Support of Pet. for Writ of Habeas Corpus (hereafter “Memo.”) (dkt. 2) at 11-25. Because the state court did not unreasonably apply the Strickland standard, Petitioner is not entitled to habeas relief from this Court.

1 To prevail on a Sixth Amendment ineffective assistance claim, a petitioner must
2 satisfy the two-pronged Strickland standard. First, the petitioner must establish that
3 counsel's performance was deficient—that is, that the attorney made errors so serious that the
4 attorney was not functioning as the “counsel” guaranteed by the Sixth Amendment.
5 Strickland v. Washington, 466 U.S. 668, 697 (1984). Second, the petitioner must show that
6 the deficient performance resulted in prejudice—that is, that there is a “reasonable
7 probability that, but for counsel's unprofessional errors, the result of the proceeding would
8 have been different.” Id. at 694. But the question before this Court is not whether counsel's
9 performance was so deficient as to meet the Strickland standard. That was for the state court
10 to decide. Rather, AEDPA directs this Court to engage in a more nuanced inquiry: whether
11 the state court's application of the Strickland standard was unreasonable. See Harrington,
12 562 U.S. at 101. This inquiry involves “a deference and latitude [to the state court] that are
13 not in operation when the case involves review under the Strickland standard itself.” Id. As
14 long as “fairminded jurists could disagree” on the correctness of the state court's decision, a
15 federal habeas court may not grant relief. Id. (citing Yarborough v. Alvarado, 541 U.S. 652,
16 664 (2004)).

17 When reviewing an ineffective assistance claim, a federal habeas court “must indulge
18 a strong presumption that counsel's conduct falls within the wide range of reasonable
19 professional assistance.” Strickland, 466 U.S. at 689. In evaluating the reasonableness of
20 counsel's actions, a reviewing court must consider the circumstances at the time of counsel's
21 conduct and cannot “second-guess” counsel's decisions or view them under the “fabled
22 twenty-twenty vision of hindsight.” Edwards v. Lamarque, 475 F.3d 1121, 1127 (9th Cir.
23 2007) (en banc) (internal quotation and citations omitted).

24 On habeas review, the state court summarily denied Petitioner's habeas petition
25 without providing a reasoned opinion. Ex. I (dkt. 21-5) at 51. Where there is no opinion for
26 the state court's ruling, “a habeas court must determine what arguments or theories supported
27 or, as here, could have supported, the state court's decision; and then it must ask whether it is
28 possible fairminded jurists could disagree that those arguments or theories are inconsistent

with the holding in a prior decision of this Court.” Harrington, 562 U.S. at 102. For the following reasons, the state court’s conclusion was neither predicated on an unreasonable determination of the facts nor contrary to clearly established federal law. See Edwards 475 F.3d at 1126 (holding that the reasonableness of counsel’s assistance is a question of law, whereas whether counsel’s actions were “tactical” is a question of fact).

A. Failure to Challenge Ayuzo’s Statements

Petitioner argues that trial counsel violated his Sixth Amendment right to effective assistance of counsel by failing to adequately make the trial court aware of the inconsistencies in Jose Ayuzo’s testimony. Memo. at 11-12. His argument has three parts. Id. at 22-24. First, Petitioner argues that trial counsel provided ineffective assistance by failing to request a continuance, and instead stipulated to the introduction of Ayuzo’s testimony through a three-page police report. Id. at 11. Second, Petitioner argues that trial counsel provided ineffective assistance by failing to play the entire four-hour video of Ayuzo’s interview with police. Id. at 14-18. Third, Petitioner argues that trial counsel provided ineffective assistance by not specifically refuting Ayuzo’s testimony during closing arguments. Id. at 19. Petitioner asserts that there was no reasonable tactical purpose for counsel’s alleged failure to discredit Ayuzo. Id. at 19-20. Because the state court’s application of the Strickland standard is objectively reasonable, Petitioner’s claims lack merit.

A difference of opinion as to trial tactics does not constitute denial of effective assistance, see United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir.), cert. denied, 469 U.S. 838 (1984). “There is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” Harrington, 562 U.S. at 109 (citations omitted). There are no “strict rules” for counsel’s conduct “[b]eyond the general requirement of reasonableness.” Cullen v. Pinholster, 131 S. Ct. 1388, 1406-07 (2011) (“No particular set of detailed rules for counsel’s conduct can satisfactorily

1 take account of the variety of circumstances faced by defense counsel or the range of
2 legitimate decisions”) (quoting Strickland, 466 U.S. at 688-89). Here, Petitioner’s
3 claims in connection with Ayuzo’s statements lack merit because they amount to quarrels
4 with tactical decisions made by trial counsel.

5 As to Petitioner’s first claim regarding continuing the trial, counsel stated that one of
6 his primary trial objectives was to keep the proceedings in front of Judge Duncan, whom he
7 believed was more sympathetic to the defense than other Monterey County judges. Ex. G.
8 (dkt. 21-3) at 10. Judge Duncan was set to retire shortly after Petitioner’s trial, so trial
9 counsel had to make the strategic decision to proceed at the scheduled time or risk having the
10 trial reassigned to a less receptive judge. Id. Counsel’s decision makes particular sense
11 when considered in conjunction with trial counsel’s other stated tactic of minimizing
12 Ayuzo’s presence in the trial, and instead emphasizing Petitioner’s version of events. Id. at
13 10-11. Trial counsel stated in his declaration that he thought “the less the trial court heard
14 from Mr. Ayuzo the better.” Id. at 10. Once the prosecutor informed trial counsel that he
15 would be introducing Petitioner’s statement, counsel concluded that he had achieved his goal
16 of keeping the trial in front of Judge Duncan while sharing Petitioner’s version of events
17 without having to call Petitioner to testify. Id. at 10. In short, trial counsel believed that the
18 advantages of proceeding with the trial in front of Judge Duncan outweighed any
19 disadvantages associated with Ayuzo’s unavailability to testify. Because trial counsel’s
20 decision appears to be based on a strategic consideration informed by investigation, trial
21 counsel’s tactic is reasonable under the circumstances.

22 As to Petitioner’s second claim regarding playing the entire four-hour videotape of
23 Ayuzo’s interview, doing so would have contradicted counsel’s proffered strategy of
24 minimizing Ayuzo’s presence in the courtroom. Id. Highlighting Ayuzo’s testimony
25 through the introduction of the entire police interview, as Petitioner suggests, emphasizes
26 Ayuzo’s testimony, rather than de-emphasizing it as trial counsel intended. Id. Additionally,
27 to the extent that the four-hour video is hearsay, it would require a stipulation from both
28 parties to be introduced into evidence. Petitioner offers no evidence that the prosecutor

1 would have agreed to the introduction of the entire video, nor an explanation as to how trial
2 counsel could have unilaterally introduced the video.

3 Further, the trial court was likely aware of inconsistencies in Ayuzo's statement. The
4 police report stated that Ayuzo "told multiple different statements and would often describe
5 incidents together that occurred on different days, or be vague when asked specific
6 questions." Ex. A (dkt. 19-3) at 285. While introducing the police report into evidence, the
7 prosecutor admitted that not everything contained within the report was the "honest truth."
8 Ex. B (dkt. 19-7) at 6. The trial court therefore was likely already aware of Ayuzo's dubious
9 credibility.

10 As to Petitioner's third claim regarding trial counsel's failure to mention Ayuzo
11 during closing arguments, Memo. at 19, deference to counsel's tactical decisions in closing
12 presentation is particularly important because of the broad range of legitimate defense
13 strategy at the time, see Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) (per curiam)
14 (counsel's exclusion of some issues in closing did not amount to professional error of
15 constitutional magnitude where issues omitted were not so clearly more persuasive than those
16 raised). While the trial court did acknowledge that Petitioner might have had a stronger case
17 without Ayuzo's testimony, Ex. B (dkt. 20) at 55, when explaining the verdict, the trial court
18 went on to say that the circumstantial evidence "was overwhelming when you take all these
19 small bits of evidence and put them together." Id. at 57. Such circumstantial evidence
20 includes the substantial number of unanswered calls from Petitioner to Ayuzo, Ex. B (dkt.
21 20) at 18-20, and the testimony from the cab driver who mentioned that he dropped Petitioner
22 off near Cabrera's home at 5:00 am, and picked him up near where the victim's body was
23 found several hours later. Ex. B (dkt. 19-7) at 71-76. When picked up, Petitioner was
24 carrying a woman's purse and several items of clothing. Id. at 70-83. Petitioner then asked
25 the taxi driver to make multiple stops until he found a suitable location, without other people
26 around, to dispose of the clothing. Id. These "small bits of evidence" created a picture of
27 culpability difficult to refute.
28

1 The state court's denial of Petitioner's habeas petition was not unreasonable because
 2 the Strickland standard requires a showing of both incompetence and prejudice; if either one
 3 of the elements is not present, relief is unavailable. See Brodit v. Cambra, 350 F.3d 985, 992
 4 (9th Cir. 2003) (state court reasonably concluded that trial attorney provided effective
 5 assistance of counsel where attorney declined to present evidence favorable to defense out of
 6 concern that it would open door to unfavorable evidence). Trial counsel's handling of
 7 Ayuzo's testimony created neither error nor prejudice. Given that the state court decision did
 8 not unreasonably apply federal law, Petitioner is not entitled to habeas relief on this theory.

9 **B. Failure to Investigate Clemente Cruz-Sumano**

10 Petitioner also contends that counsel provided ineffective assistance by failing to
 11 investigate Clemente Cruz-Sumano, who revealed inconsistencies in Ayuzo's statements to
 12 police. Pet. at 7. On habeas review, the state court denied this claim. Ex. I (dkt 21-5) at 51.
 13 Because this determination was not objectively unreasonable, Petitioner is not entitled to
 14 relief.

15 A defense attorney has a duty to either make reasonable investigations or a reasonable
 16 decision that investigation is unnecessary. See Strickland, 466 U.S. at 691; Hinton v.
 17 Alabama, 134 S.Ct. 1081, 1088 (2014) (per curiam). But the duty to investigate and prepare
 18 a defense does not require interviewing every possible witness. Hendricks v. Calderon, 70
 19 F.3d 1032, 1040 (9th Cir. 1995). Strickland directs that "'a particular decision not to
 20 investigate must be directly assessed for reasonableness in all the circumstances, applying a
 21 heavy measure of deference to counsel's judgments.'" Silva v. Woodford, 279 F.3d 825, 836
 22 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 491)

23 Here, Petitioner argues that trial counsel failed to conduct an investigation into
 24 statements made by Cruz-Sumano, thus depriving him of his Sixth Amendment right to
 25 effective counsel. Pet. at 7. During his police interview, Cruz-Sumano reported that around
 26 the time of the murder, Ayuzo mentioned that he was going to be paid a large amount of
 27 money for a drug deal. Ex. G (dkt. 21-3) at 17-19. Petitioner alleges that trial counsel
 28 provided ineffective representation because Cruz-Sumano's statements contradicted a key

1 component of Ayuzo's testimony: that Petitioner offered Ayuzo money to assist in staging a
2 robbery and battering a woman. Trav. at 12. In response, trial counsel explained that he did
3 not interview Cruz-Sumano because "impeaching Mr. Ayuzo's testimony was not the focus
4 of my trial strategy." Ex. G (dkt. 21-3) at 10. Because counsel's tactical decisions are only
5 entitled to deference if based on reasonable investigation, Petitioner argues that the state
6 court erred in denying his petition. Memo. at 26-27. Having failed to investigate the
7 credibility of Cruz-Sumano or the value of his potential testimony, it is difficult to conclude
8 that counsel's decision was reasonable.

9 Yet even if trial counsel's decision not to investigate Cruz-Sumano constituted
10 deficient performance, Petitioner is unable to show with reasonable probability that the
11 failure to investigate Cruz-Sumano created prejudice. See Strickland, 466 U.S. at 688. "To
12 determine whether counsel's failure to investigate prejudiced the outcome of the trial, [the
13 Court] must compare the evidence that was actually presented to the jury with that which
14 would have been presented had counsel acted appropriately." See Thomas, 678 F.3d at
15 1102 (citing Karis v. Calderon, 283 F.3d 1117, 1133 (9th Cir. 2002)).

16 Even with additional evidence to impeach Ayuzo's credibility, it is unlikely that the
17 trial court would have disregarded the remaining evidence that supported Petitioner's murder
18 conviction based on a conspiracy theory. Significant evidence indicated that Petitioner was
19 aware of the plan to kill Singh prior to arriving at Cabrera's home. Memo P&A in Support
20 of Answer at 22. At around 4:30 a.m. on the night of the murder, Petitioner, clad in plastic
21 gloves, called a taxi and asked to be dropped off a few houses away from Cabrera's home.
22 Ex. B (dkt. 19-7) at 71-74. Prior to being dropped off, Petitioner asked to be picked up
23 several hours later near the exact spot where the victim's body was found. Id. at 75.
24 Petitioner had also previously mentioned to his supervisor that he would be late for his shift
25 at Burger King the morning of the murder. Id. at 21.

26 In addition, even if counsel had called Cruz-Sumano to testify, his statements could
27 have harmed Petitioner, as they are not altogether inconsistent with the prosecutor's theory of
28 Petitioner's involvement in the murder. With the exception of the solicited transgression,

1 Cruz-Sumano's police interview confirmed that Petitioner had visited Ayuzo and offered him
2 a large amount of money to participate in a crime around the time of murder. Ayuzo's
3 fabrication regarding the potential offense could be explained as Ayuzo's having believed
4 that delivering drugs for money was a more socially acceptable crime to admit to than tying
5 up and battering a woman.

6 While it is possible that the trial court would have reached a different outcome with
7 the inclusion of Cruz-Sumano, it cannot be said with "reasonable probability" that counsel's
8 failure to investigate Cruz-Sumano's testimony would have led to materially exculpatory
9 information. See Strickland 466 U.S. at 694. Given the other evidence and the problems
10 with Cruz-Sumano's statements, it is reasonable to conclude that Petitioner received a fair
11 trial in the absence of Cruz-Sumano's testimony. See Strickler v. Greene, 527 U.S. 263, 289
12 (1999) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)) ("The question is not whether
13 the defendant would more likely than not have received a different verdict with the evidence,
14 but whether in its absence he received a fair trial, understood as a trial resulting in a verdict
15 worthy of confidence."). This Court does not agree that counsel's failure to investigate
16 should lead to habeas relief.

17 **C. Failure to Object to Coconspirator's Statements**

18 Petitioner further contends that his attorney rendered ineffective assistance by failing
19 to object to the introduction of Victor Cabrera's statements to police. Because Cabrera's
20 statements were not testimonial or admitted for the truth of the matter asserted, trial counsel's
21 failure to object to the introduction of Cabrera's statements does not constitute ineffective
22 assistance.

23 The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal
24 prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against
25 him." U.S. Const. amend. VI. This right applies to all "testimonial" statements, whether
26 sworn or unsworn, and to both in-court testimony and out-of-court statements introduced at
27 trial. Crawford v. Washington, 541 U.S. 36, 51-52 (2004). But "[t]he Clause does not bar
28 the use of testimonial statements for purposes other than establishing the truth of the matter

1 asserted.” Id. at 59 n.9. Only testimonial statements offered for the purpose of establishing
2 the truth of the matter asserted are inadmissible, unless the declarant is unavailable and the
3 defendant had a prior opportunity for cross-examination. Id. at 68.

4 Here, Officer Jeff Gibson interviewed Cabrera at the scene of the fake robbery, Ex. B
5 (dkt. 19-7) at 10-13, and Officer Amy Carrizosa interviewed Cabrera later the same day at
6 the police station, id. at 25-26. In both police interviews, Cabrera shared a largely fabricated
7 story regarding the staged incident. Id. at 9-13, 26-38. In neither interview did Cabrera
8 mention Petitioner by name or describe the illegal conduct. Instead, Cabrera recounted a
9 false tale of arriving at the location of the alleged crime and, shortly thereafter, being
10 assaulted by two men. Id. at 10, 35-38. In contrast to Cabrera’s version of events, at trial,
11 both parties stipulated that Cabrera strangled the victim between midnight and 2 a.m., id. at
12 39, prior to when Cabrera claimed that he and Singh arrived at the scene of the alleged
13 robbery. Id. at 34. Neither party disputes that Cabrera’s statements regarding the fake
14 robbery-murder were false.

15 Shortly after Cabrera’s second interview with police, he disappeared. Ex. B (dkt. 19-
16 7) at 48-49. Accordingly, Cabrera’s statements to police regarding the fake robbery were
17 introduced at trial through the testimony of Officer Gibson and Officer Carrizosa. Trial
18 counsel objected to the introduction of Officer Gibson’s testimony on hearsay grounds but
19 was overruled under the exception for statements made in furtherance of a conspiracy. Id. at
20 9-10. Trial counsel did not object to the introduction of Officer Carrizosa’s testimony and
21 later stated that he did not believe that keeping Cabrera’s statements out of evidence would
22 do much good. Ex. G (dkt. 21-3) at 11.

23 Petitioner now argues that Officer Carrizosa’s testimony regarding Cabrera’s
24 interview with police constitutes testimonial hearsay and should have been objected to by
25 trial counsel. Memo. at 29-30. Petitioner is incorrect. While statements to police are
26 traditionally considered testimonial hearsay, see Crawford, 541 U.S. at 53, importantly, none
27 of Cabrera’s statements were admitted for the purpose of establishing the truth of the matter
28 asserted, see Moses v. Payne, 555 F.3d 742, 761 (9th Cir. 2009) (finding state court properly

1 admitted son's out-of-court statement to social worker that his father had kicked his mother;
 2 statement was introduced to show why social worker contacted Child Protective Services, not
 3 to prove that defendant had kicked the victim). The prosecution was not offering Cabrera's
 4 statements as evidence that the robbery was real. Rather, Cabrera's police interview merely
 5 provided context for the fake murder-robbery conspiracy. While Petitioner argues that
 6 Cabrera's statements prejudiced him by further corroborating portions of Ayuzo's testimony,
 7 in light of the other circumstantial evidence which supported Petitioner's conviction such as
 8 testimony from the taxi driver and several late-night meetings with Cabrera in the weeks
 9 leading up to the murder, Ex. B (dkt. 19-7) at 14-20, the state court's rejection of this claim
 10 was not objectively unreasonable,¹ see Williams v. Taylor, 529 U.S. 362, 409 (2000).

11 Because Petitioner cannot establish that the state court unreasonably applied the
 12 Strickland standard on any of the alleged errors, the petition for habeas corpus as to his
 13 ineffective assistance of counsel claims is denied.

14 **D. Cumulative Prejudice**

15 Petitioner's final argument is that cumulative prejudice requires reversal of the state
 16 court's decision. Memo. at 33. Petitioner's claim is without merit.

17 The Ninth Circuit has held that, in exceptional cases, while no single trial error is
 18 sufficiently prejudicial to warrant reversal, the cumulative effect of several trial errors might
 19 prejudice a defendant so much that his conviction must be overturned. See Alcala v.
 20 Woodford, 334 F.3d 862, 893-95 (9th Cir. 2003). This is not such an exceptional case.

21 Cumulative error violates due process principles and warrants habeas relief only
 22 "where the errors have 'so infected the trial with unfairness as to make the resulting
 23 conviction a denial of due process.'" Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007)
 24 (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). Furthermore, cumulative
 25 error applies only where no single error is sufficiently prejudicial but the effect of multiple

26
 27 ¹ Petitioner further contends that Cabrera's statement to Officer Carrizosa was inadmissible
 28 under the coconspirator hearsay exception because at the point it was taken, the object of the conspiracy,
 specifically the fake murder-robbery, was complete. Trav. at 15. Because Cabrera's statements were
 admissible on the ground that they were not being asserted for their truth, this Court need not address
 Petitioner's argument.

1 errors compound the impact. See Alcala, 334 F.3d at 893-95. Where, as here, “there is no
2 single constitutional error . . . , there is nothing to accumulate to a level of constitutional
3 violation.” Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); see Hayes v. Ayers, 632
4 F.3d 500, 525 (9th Cir. 2011) (holding that where no error reaches constitutional magnitude
5 on habeas review, no cumulative error is possible). Petitioner’s claim that cumulative error
6 requires reversal of his conviction is without merit.

7 **IV. CONCLUSION**

8 The state court’s conclusion that Petitioner’s trial counsel was not ineffective is not
9 contrary to clearly established Federal law or predicated on an unreasonable determination of
10 the facts. Accordingly, the petition for a writ of habeas corpus is DENIED.

11 **IT IS SO ORDERED.**

12
13
14 Dated: June 19, 2015



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE